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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**CRAIG PETER SALAZAR,**

**Defendant and Appellant.**

**A125361**

**(Sonoma County  
Super. Ct. No. SCR-515493)**

Defendant Craig Peter Salazar (appellant) pled no contest to assault with a firearm and admitted a firearm use enhancement. The trial court sentenced him to a six-year prison term. On appeal, he contends the trial court erred by not giving reasons for its sentencing choice and because the court did not recognize it had discretion to impose a mitigated prison term without finding mitigating facts. We reject his contentions and affirm.

### BACKGROUND<sup>1</sup>

Appellant, who had been evicted, borrowed a trailer from the victim, Danny Roberson, so that appellant could move his possessions. After appellant refused to return the trailer, Roberson went to the property where appellant was staying and where the trailer and two other vehicles owned by Roberson were located. Roberson and appellant

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<sup>1</sup> Because appellant pled no contest prior to trial, the factual background is taken from the probation department's presentence report.

argued. Appellant retrieved a rifle, threatened to kill Roberson, and pointed the rifle at Roberson's head from approximately three feet away. Appellant laughed and stated, "How does it feel to live." Then he told Roberson "I'm going to kill you," and acted as if he was going to pull the trigger.

Roberson called 911 on his cellular phone. While Roberson spoke to the dispatcher, appellant got onto a tractor and positioned the tractor so as to prevent Roberson from removing his vehicles. Appellant rammed one of Roberson's vehicles with the tractor.

The police located the rifle, which was loaded, on the front porch of the trailer where appellant was staying.

An information was filed in August 2007, charging appellant with assault with a firearm (Pen. Code, § 245, subd. (a)(2))<sup>2</sup> and making a criminal threat (§ 422). The information alleged as to both counts that appellant personally used a firearm. In December 2008, appellant pled no contest to assault with a firearm and admitted the firearm use allegation. In May 2009, the trial court sentenced appellant to a prison term of six years, including the middle term of three years on the assault charge and the low term of three years on the firearm use enhancement. The criminal threat charge was dismissed.

Defendant obtained a certificate of probable cause and appealed.

## DISCUSSION

Appellant contends the trial court failed to give reasons for its sentencing choice and failed to recognize it had discretion to impose the mitigated prison term for assault with a firearm without finding mitigating facts.<sup>3</sup> Addressing these claims requires detailing the background leading up to imposition of the sentence in this case.

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<sup>2</sup> All further undesignated section references are to the Penal Code.

<sup>3</sup> Respondent contends appellant forfeited these issues because he did not object below on these grounds during sentencing. We review the merits of appellant's contentions because he contends he received ineffective assistance of counsel. Because we conclude the court did not fail to give reasons or misunderstand the scope of its discretion, the

In its January 2009 presentence report, the probation department recommended an eight-year prison term. Among other things, the recommendation was based on appellant's "unsatisfactory" past performance on probation; the fact that appellant's ability to comply "may be hindered by ongoing mental health issues, history of pervasive substance abuse issues, and possible anger issues"; and appellant's lack of remorse. As circumstances in aggravation, the report listed: "(b)(1) [Appellant] has engaged in violent conduct which indicates a serious danger to society. (b)(2) [Appellant's] prior convictions as an adult are numerous. (b)(5) [Appellant's] prior performance on grants of probation has been unsatisfactory." The probation officer found no mitigating circumstances. Because "the factors in aggravation prevail," the report recommended the upper-term sentence for the assault with a firearm and the middle term for the use enhancement.

In a January 2009 statement in mitigation, appellant argued for probation, pointing out, among other things, that he had "no history of violence in his past," "[h]is criminal history is replete with alcohol related offenses," and he ultimately walked away from the confrontation with Roberson without inflicting physical injury. At the outset of the February 2009 sentencing hearing, the trial court stated that "confinement in state prison would be appropriate but not for the length of time indicated in the probation report." The prosecutor responded, "if the court is considering the mid[dle] term, the People would be prepared to submit it." The court responded that it was "considering imposing the lower term of two years plus the low-term enhancement." The prosecutor argued, "this was a wildly dangerous behavior pointing a [.308] type of rifle at the victim's head, crashing into cars, certainly sociopathic behavior would not be an unreasonable characterization of the action."

Defense counsel observed that appellant "has absolutely no history of violent behavior," had only one felony conviction in 1988, has a history of alcohol abuse about

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failure to object did not constitute ineffective assistance of counsel. (*People v. Carter* (2003) 30 Cal.4th 1166, 1204.)

which he is in denial, and would “benefit from intense supervision and treatment.” She pointed out that, in the underlying incident, appellant “got himself under control and . . . there was no physical injury. . . .” Defense counsel requested a finding of unusual circumstances and grant of probation. In the alternative, she requested a postponement of sentencing so appellant could undergo a diagnostic evaluation. The prosecutor opposed delay for further evaluation and stated that the People would “submit on the matter” if the court were “inclined to the mitigated term.” The court ordered a diagnostic evaluation pursuant to section 1203.03.

The February 2009 diagnostic report concluded that “the seriousness of this offense justifies incarceration.” Among other things, the report highlighted appellant’s past performance on probation, substance abuse, and lack of remorse or insight. A separate February 2009 “brief psychological evaluation” discussed appellant’s depressive episodes and substance abuse, and stated that appellant did not “exhibit a highly sociopathic personality and in this respect he may be considered less dangerous than other, more sociopathic inmates.”

At the outset of the resumed sentencing hearing in May 2009, the trial court indicated it had reviewed the various reports and other relevant documents. The court stated it was “very concerned about this particular defendant and his conduct. . . . It appears to the [c]ourt that a state prison term should be imposed, and the question is the length of any such term of imprisonment.” Defense counsel reiterated her request for probation, and in the alternative requested the mitigated term. The court asked defense counsel, “How is it the [c]ourt would make findings to indicate that this would be a mitigated term?” Counsel suggested reliance “on the fact that the Florida priors date back to 1988; that there[ i]s no history of violence based on the criminal history set forth in the probation report; that those are his only felony convictions from 1988.” The prosecutor countered that there was an “extraordinary level of violence with the underlying offense.” He agreed that “perhaps something less than the eight year term is warranted, but we quite frankly don’t see anything in mitigation.”

The trial court concluded: “Well, this is extremely serious and a very dangerous situation. And for all of the reasons cited within the probation report, I don’t see how the [c]ourt can reasonably or logically impose a mitigated state prison term on the offense. [¶] As to the use allegation . . . , I do think the lack of firing the weapon or using it as a blunt instrument could allow the [c]ourt to impose a mitigated term . . . , probation is denied and the defendant is committed . . . for a term of six years.”

I. *The Trial Court Did Not Fail to State Reasons for Its Sentencing Choice*

Appellant contends the trial court failed to state reasons for imposition of the middle term on the assault with a firearm charge. Under the California Rules of Court,<sup>4</sup> the court was required to “state in simple language the primary factor or factors that support the exercise of discretion.” (Rule 4.406(a).) Although the court’s statement in the present case was brief, the court did justify its decision to impose the middle term by stating “this is extremely serious and a very dangerous situation.” That reason echoed the prosecutor’s reference to the “extraordinary level of violence with the underlying offense” and the conclusion in the diagnostic report that “the seriousness of this offense justifies incarceration.” The court’s remarks also implicitly reflect a conclusion that the mitigating circumstances suggested by defense counsel did not justify imposition of the mitigated term. The trial court was not required to “identify aggravating and mitigating factors, apply a preponderance of the evidence standard, or specify the ‘ultimate facts’ that ‘justify[] the term selected.’ ” (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851 (*Sandoval*)). None of the cases cited by appellant on appeal required the trial court to provide more detailed reasons for its sentencing choice.

Appellant argues the trial court failed to explain why it decided not to follow its earlier inclination to impose the mitigated term. However, he cites no authority that the court was required to do so. Appellant also argues it was improper for the trial court to rely on the reasons provided in the probation report. However, although the court did refer to the probation report, it also stated the primary reason for its sentencing choice.

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<sup>4</sup> All further rules references are to the California Rules of Court.

Thus, this case is distinguishable from the cases cited by appellant. Finally, appellant appears to argue that the court abused its discretion in imposing the middle term based on the seriousness and dangerousness of appellant's conduct. We decline to address that issue, which was raised for the first time in appellant's reply brief. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.)

## II. *Appellant Has Not Shown the Trial Court Failed to Recognize Its Discretion*

Next, appellant contends the trial court failed to recognize it had discretion to impose the mitigated prison term for assault with a firearm without finding mitigating facts. In *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the United States Supreme Court concluded that the version of California's determinate sentencing law (DSL) then in effect did not comply with a defendant's right to a jury trial. (See *Sandoval, supra*, 41 Cal.4th at p. 835.) At the time, California's DSL specified three terms of imprisonment for most offenses and provided that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (*Sandoval*, at p. 836.) The facts relevant to the sentencing choice were to be determined by the court and needed be proved by a preponderance of the evidence. (*Ibid.*) As summarized in *Cunningham*, "California's DSL, and the [rules of court] governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense." (*Cunningham*, at p. 279.) For Sixth Amendment purposes, the middle term under the DSL was the maximum term that could be imposed on the basis of the jury's verdict alone. (*Cunningham*, at p. 288; see also *Sandoval*, at p. 836.)

In response to *Cunningham*, the California Legislature amended the DSL by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3; *Sandoval, supra*, 41 Cal.4th at p. 836, fn. 2.) In response to amendment of the DSL, the Judicial Council amended the California Rules of Court effective May 23, 2007. (Rules 4.405 through 4.452; *Sandoval*, at p. 836, fn. 3.) Under the amended scheme, the trial court is required to specify reasons for its sentencing decision, but the court is not required to state "facts"

that support its decision. (See §§ 1170, subd. (c), § 1170.3; rule 4.420; see also *Sandoval*, at pp. 846-847.) In particular, the court’s statement of reasons no longer needs to include a statement of the facts constituting circumstances in aggravation or mitigation. (Compare § 1170, subd. (b) [“[t]he court shall set forth on the record the reasons for imposing the term selected”] with former § 1170, subd. (b), as amended by Stats. 2004, ch. 747, § 1 [“[t]he court shall set forth on the record the facts and reasons for imposing the upper or lower term”].) The rules state that “In exercising his or her discretion in selecting one of the three authorized prison terms . . . , the sentencing judge *may* consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” (Rule 4.420(b), italics added.) As relevant to the present case, the reforms effectively afford trial courts “increased discretion to impose the lower term” by removing “the requirement that the middle term be imposed in the absence of aggravating or mitigating circumstances.” (*Sandoval*, at p. 855.)

In this case, appellant contends the trial court did not understand the scope of the discretion afforded to it under the reformed DSL, because the court’s comments indicate that it believed it had to find mitigating facts in order to impose the lower term. At the outset, we emphasize there is a presumption that the trial court’s official duties were regularly performed. (Evid. Code, § 664 [“It is presumed that official duty has been regularly performed.”].) That presumption may be rebutted where “irregularity is clearly shown.” (*In re Elsholz* (1964) 228 Cal.App.2d 192, 197.) The “presumption ‘affect[s] the burden of proof’ [citation], meaning that the party against whom it operates . . . has ‘the burden of proof as to the nonexistence of the presumed fact.’ [Citations.]” (*People v. Martinez* (2000) 22 Cal.4th 106, 125.) The presumption applies to actions of trial court judges. (*Ibid.*; see also *Younesi v. Lane* (1991) 228 Cal.App.3d 967, 974, disapproved on another ground in *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.App.4th 51, 63.)

Appellant has not clearly shown there was any irregularity. Appellant relies on the trial court’s question to defense counsel, “How is it the [c]ourt would make findings to indicate this would be a mitigated term?” But that inquiry is ambiguous. Appellant’s

interpretation is that the court was expressing a need for support for a factual finding that a mitigating factor existed. But it is also reasonable to interpret the inquiry as a request for reasons in support of imposition of the mitigated term; the fact that the court referred to making “findings” does not itself show the court misunderstood the scope of its discretion. In imposing sentence, the court stated it could not “reasonably or logically impose a mitigated state prison term.” This reflects the court’s exercise of its discretion based on the entirety of the record. Notably, there is no indication that any disputed issues of fact were relevant to the trial court’s sentencing choice: the prosecutor did not dispute the defense counsel’s factual characterizations of the circumstances she proffered as reasons to impose the lower term; instead, he argued that appellant’s violent conduct merited imposition of at least the middle term. In light of the lack of relevant factual disputes, it would be illogical to conclude the trial court’s inquiry reflected concern about whether there was support for a factual finding that a mitigating factor existed. It is more logical to interpret the inquiry as eliciting defense counsel’s argument why imposition of the mitigated term would be appropriate in light of the totality of the circumstances.

#### DISPOSITION

The judgment is affirmed.

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SIMONS, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.